No. 15131

United States
COURT OF APPEALS
for the Ninth Circuit

STATES STEAMSHIP COMPANY, a corporation, *Appellant,*

v.

UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

ATLANTIC MUTUAL INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, a corporation, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

PACIFIC NATIONAL FIRE INSURANCE COMPANY, *Appellant,*

v.

STATES STEAMSHIP COMPANY, UNITED STATES OF AMERICA and THE DOMINION OF CANADA, *Appellees.*

UNITED STATES OF AMERICA, *Appellant,*

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE DOMINION OF CANADA, *Appellees.*

THE DOMINION OF CANADA, *Appellant,*

v.

STATES STEAMSHIP COMPANY, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY and THE UNITED STATES OF AMERICA, *Appellees.*

BRIEF OF STATES STEAMSHIP COMPANY AS APPELLEE IN ANSWER TO THE BRIEFS OF UNITED STATES OF AMERICA, ATLANTIC MUTUAL INSURANCE COMPANY, PACIFIC NATIONAL FIRE INSURANCE COMPANY AND THE DOMINION OF CANADA AS APPELLANTS ON THE QUESTION OF LIMITATION

Appeal from the United States District Court for the District of Oregon.

WOOD, MATTHIESSEN, WOOD & TATUM,
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BOGLE, BOGLE & GATES,
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STEVENS-NESS LAW PUB. CO., PORTLAND, ORE. 2-57

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Appeal from the United States District Court for the District of Oregon.

To the Honorable Judges of the above entitled Court:

Before proceeding to a more detailed statement of the case and argument, we would like to make these preliminary observations:

I.

This is appellee's brief in answer to two briefs of the Government and the insurance companies. Where both those briefs cover the same subject, we shall answer then, insofar as possible, as one. Where they materially differ, we shall answer each separately.

II.

If the contentions in our opening brief as appellant are upheld, as we believe they must be, then of course this brief and all discussion of limitation become superfluous.

III.

Limitation is favored, as this Court so well knows. Even as recently as 1943 this doctrine has been enunciated again by the United States Supreme Court, declaring that the statute must be construed liberally in the interest of shipowners, and not administered with a tight and grudging hand. Coryell v. Phillips (1943), 317 U.S. 406, 411. There are many other authorities, and this Court knows them well.

IV.

To defeat limitation the claimants must prove not merely that there was a failure in equipment and inspection or personnel to which the shipowner was privy, but it must also be shown that such fault actually contributed to the loss.

"This is a practical world and an omission to which a ship owner is privy but which has not any causal connection with the damage for which claim is made is venial in the eyes of the law." The El Sol, 45 F. (2d) 852 (D.C.S.D.N.Y. 1930).

V.

When the cases speak of knowledge, they sometimes include the means of knowledge, but only such means of knowledge as the shipowner is *bound* to avail himself of.

The Francesca, 19 F. Supp. 829,
The Cleveco, 59 F. Supp. 71, affirmed 154 F. (2d) 605,

both cited in the insurance brief. It does not mean mere negligence.

La Bourgogne, 210 U.S. 95,
American Hawaiian SS Co. v. Pacific SS Co., 41 F. (2d) 718.

VI.

The presumption is in favor of the Trial Court's Finding of Fact. His Finding of lack of *privity* is a Finding of *Fact* not to be disturbed unless clearly contrary to all the evidence.

VII.

Counsel say that the burden of proving lack of privity is on the petitioner. That is true in the first instance. But the petitioner has borne that burden. The burden has now shifted, or at least the burden of persuasion. For the appellants must now persuade this Court that the Trial Court's Finding on this question of fact was clearly erroneous.

VIII.

Mr. Vallet, acting Marine Superintendent, is the principal target of appellants in their endeavor to establish privity. As the Record shows, and as will be demonstrated in our argument, his alleged privity could, at the most, relate only to the alleged "crack-sensitiveness" or "notch-sensitivity" of the vessel's hull, and in a minor way to the emergency steering gear rod from the poop deck to the engineroom below.

He was not privy to the steering gear in general. That was the province of the ship's officers, supplemented by the American Bureau surveyors and the Coast Guard inspectors.

Nor was he privy to cargo stowage. It was not in his department and he knew nothing about it. In this case it was the business of the Army and the ship's master.

It is plain too that he was not privy to the cross-battens on the hatches. He relied on his ship's officers and got no adverse reports. There was nothing wrong with them anyway.

Minor characters at whom appellants aim are Brenneke, one of Vallet's assistants, Pitzer, of the Company's Cargo Department, and Matson, District Manager of the Seattle Branch Office. Their inconsequentialities will be demonstrated.

Such is the brief outline of our case.

IX.

The sole question presented by claimants' appeal is as follows:—

Where the Trial Court has stated in his Memorandum Opinion that "Those charged with (the vessel's) inspection used the care of reasonable and prudent persons and the unseaworthiness of the vessel was without privity or knowledge of the owner of the vessel", and where he has followed this with Finding (VII), "That the evidence is sufficient to show that the unseaworthy condition of the vessel at the inception of her voyage was without the privity or knowledge of petitioner", and where these Findings of Fact are amply supported by overwhelming evidence of the personal diligence exercised by the managing agents of the corporate shipowner, is there any basis upon which those Findings can be set aside as clearly erroneous?

X.

We are unable to accept in their entirety the statements of the case in appellants' two briefs. Certain inaccuracies or incomplete statements occur in each. Some of these we can cure in the argument. A few we notice now.

For example, in the insurance brief, the definition of a Class I Casualty as danger to the vessel, etc. (page 5), means, of course, *before its repair.*

The statement on page 11 of the insurance brief that no other ship sustained major heavy weather damage we disagree with, as pointed out in our Opening Brief, page 59.

The "significant radio messages", referred to on page 12 of the insurance brief and set forth in the appendix, omit the first, and very significant one,—

"WIND 292° VEL. 45-50 M.P.H. SEA HT MOUNTAINOUS" (Exh. 97).

The statement in the Government brief, page 18, that the Maritime Commission "warned" against the alteration of the deep tanks, quoting a letter from the Commission, is only a half truth. The brief omits to add that the writer of the letter *was overruled by his superiors in Washington and the objection was withdrawn* (Tr. 154-155, Exh. 7; Tr. 249-253).

On page 27 of the Government brief is a statement of weather forecasts, purported to be supported by Exhibit 176. The exhibit was never introduced, and is not in evidence, and is no part of the record.

At pages 27 and 28 of the Government brief, reference is made to the radiograms from the ship, but again omits Exhibit 97 with its highly significant "SEA HT MOUNTAINOUS".

With these corrections, we now proceed to our own.

STATEMENT OF THE CASE

We made a brief statement of the case on pages 67 to 72 of our Opening Brief as appellant, under the heading "Evidence of the PENNSYLVANIA's Seaworthiness". It is appropriate now, however, since we are discussing a new subject, namely, limitation and privity, to make a further statement pertinent to that subject. This statement will show the general organization and setup under which the shipowner operated its ships, including the PENNSYLVANIA.

Mr. J. R. Dant was the Vice-President and General Manager in charge of the Company's general activities (Tr. 2618). Neither he nor any of the directors took any direct part in the operation of the vessels. The Marine Superintendent, Captain Dyer, was on leave of absence during all the period in question, and his duties were performed by Mr. Vallet, Port Engineer and acting Marine Superintendent, who was in direct charge of the upkeep, repair, maintenance, manning and supplying the ships (Tr. 140, 2618-9). He had nothing to do with the cargo part of the operation; neither its booking, loading, stowing or anything else (Tr. 187, 280-281, 486, 1174, 2619, 2687, Exh. 132B, Article 5(h)). In a general commercial operation, cargo was booked or contracted for, by the Cargo Department of the Company, loaded by stevedores employed by the Company, and stowed under the supervision of the master of the ship.

In this present case of the PENNSYLVANIA, the procedure was different. Certain space of the ship, including the deck, was simply made available to the Army under contract (Exh. 132-B), for such cargo as they wished to be carried, and the Army loaded it with its own stevedores and its own supercargoes, but under the final supervision and control of the ship's master. The petitioner also had supercargoes aboard. They were not regular employees, but were hired out of the Union Hall for this job. They had nothing to do with stowage of cargo, as affecting seaworthiness. Rather, their function was mainly to report daily on the progress of the loading (Tr. 1166), and to see "that the Army stays

within the space they are paying for" (Tr. 2575), and makes a tight stow, "using no more space than would normally be required for the loading of like cargo (Exh. 132-B, Art 5(b)).

Mr. Vallet had set up, or more properly, had succeeded to, a system for the upkeep and operation of the vessels, whereby the officers of the ship, and particularly the master and chief engineer, were held directly responsible for the proper upkeep, maintenance, and repair of their own ship. These are trained men, of long experience, who have to pass rigid Coast Guard examinations before attaining their office, and the system of relying upon them is that employed in all well-run steamship operations by all companies. (Cf. Mr. Brenneke's testimony about the examination and qualifications of a chief engineer, Tr. 321-322.)

Pursuant to this system Mr. Vallet, or one of his assistants, would visit each vessel on its return from a voyage, get the reports from the officers of the vessel's performance and any voyage repairs needed, and see that the officers' requisitions therefor were fulfilled. The system was a good one, universally recognized in shipping operations, and Mr. Vallet was diligent in employing a competent shore-side staff to see that it was carried out. His own wide experience and qualifications may be read on page 139 of the Transcript. He, himself, describes the functions of his department in these words:—

> " . . . I was in charge of the Marine Department which in addition to the maintenance and repair of

the vessel also is charged with the obtaining of personnel and the officers for the ships and maintaining the discipline on the vessels and also supplying and storing the ships." (Tr. 140).

His own description of the working of this system may be found in the following excerpts from his testimony:—

"Whenever a ship returns from a voyage, either myself or one of my assistants boards the vessel on arrival and discusses the general condition of the vessel with the Master, chief engineer, and we obtain a list of repairs which are requested by the vessel.

Q. Voyage repairs, you mean?

A. Voyage repairs, and examine any other damages that have occurred on the voyage." (Tr. 160-161).

"Q. What are the functions of a chief engineer with regard to the upkeep of the vessel and reporting to his superiors at the end of a voyage what has to be done?

A. It is the responsibility of the chief engineer to prepare requests for voyage repairs before the vessel arrives in port. He obtains a request for repairs from the other departments, and in conjunction with the Master determines what repairs will be necessary before the vessel again goes out on the next voyage.

Q. So the chief engineer is the officer primarily responsible for those things, is he?

A. Yes, he is." (Tr. 172-173).

Referring to a spare propeller which was carried on the poop deck and lost overboard in a storm:—

"We looked to the Master and the officers to report any condition which in their opinion is not satisfactory.

Q. Assuming the fact that you were Marine Superintendent, assuming it was in Portland, she was loaded here, you would have gone down there and taken a look yourself to see if they were adequately secured?

A. Well, we make inspection of vessels for our own satisfaction; however, we hold the Master and his officers responsible for that." (Tr. 187-188).

"When a vessel comes back from a voyage you or your assistant inspect the vessel upon its return, talk to the Master, talk to the Chief Engineer?

A. Yes, sir." (Tr. 188-9).

"We check the vessel and we always depend on an examination by the officers, reports that we obtain from the officers." (Tr. 231).

To the same effect is Mr. Brenneke's statement:

"The Chief Engineer takes that oath when he receives his original Chief Engineer's license, that he will maintain and operate the ship and keep in repair all machinery and appurtenances on the vessel to the very best of his knowledge and ability, and he swears to that statement." (Tr. 321).

Of course the steering gear and cross-battens on the hatches, both of which have been subject to attack by claimants, fall within the appurtenances and equipment of the ship, which it is the responsibility of the officers, and not Mr. Vallet personally, to keep up.

To be specific on this point, Mr. Matthews, Chief Engineer of the PENNSYLVANIA on all five voyages prior to the last, testified as follows:—

"Q. As Chief Engineer you are responsible for the proper functioning of the steering apparatus of the ship, are you not?

A. That is right.

Q. And as such on Voyage 5, did you make inspections of the steering gear from time to time?

A. Yes, and inspections are also made every watch.

Q. By whom?

A. By the man oiling the steering engine.

Q. By the what?

A. By the man oiling the steering gear.

Q. In your inspections would you have occasions to go aft of the steering engine room?

A. I would go aft every day. I would inspect everything every day, all of the equipment that is running." (Tr. 350-351).

Similarly as to the cross-battens, if there was anything wrong with them, which there wasn't, it would not be up to Mr. Vallet, it would be up to his ship's officers to repair them, or if new ones were needed, to requisition them.

Matthews testified:—

"Q. There has been some testimony here that the cross-battens on the hatches, or possibly the other battens but I am not sure, were bent or twisted. Whose function on the ship is it to repair the battens if they are defective in any way?

A. The engine department.

Q. Is that your department?

A. Yes, sir.

Q. Did you ever receive from the deck department any request to make any such repairs?

A. No, sir.

Q. Did you ever repair any deck battens?

A. No, sir; not on that ship. No, sir." (Tr. 2830).

Mr. Vallet, as acting Marine Superintendent, was diligent in the extreme in enforcing this system. Either he personally, or one of his assistants, visited each ship

on its return, obtained the reports of the ship's officers and acted on them, one of his assistants remaining in attendance on the ship to see that everything necessary to be done, was done. He personally attended the annual survey of the ship by the Coast Guard and the American Bureau at Tacoma and Seattle in August, 1951. He sent Mr. Brenneke to attend the drydock examination in December, 1951 (Tr. 177, 270-271). He personally, in conjunction with the American Bureau and the Coast Guard, drew the specifications for the repair of the deck crack on Voyage 5, and personally attended to the repairs and saw that they were carried out. Through his own personal diligence at that time, he discovered the little minute crack where a deck padeye had been flushed off on the port side of the deck, and had it cut out and an insert plate put in. He, along with the Coast Guard, attended to the minor matter of freeing the emergency steering gear rod from the clothing wrapped around it. After the repairs to the deck crack, "The vessel was in topnotch condition in every way possible," and between that date and the time for departure from Seattle, January 5, he never received any reports or statements or any information derogatory to her seaworthiness (Tr. 177). In fact, since the vessel performed perfectly on all her five voyages (Tr. 188, 338-339), it is plain that he never received any adverse reports at any time.

Neither Mr. Vallet nor his department had anything to do with the stowage of cargo. That was, as in all proper steamship operations, the final province and pre-

rogative of the ship's master, aided by his mates. This is stated so many times in the record (Tr. 187, 280-281, 486, 2619, 1174, Exh. 132-B, Tr. 2687) that it is curious claimants should even question it.

The very contract under which the cargo was carried provided that it was to be loaded under the supervision and final direction of the master. Vallet had no reason to know where the cargo was stowed or how it was stowed. It was not his business.

The Company maintains branch offices at various ports,—Los Angeles, San Francisco, Seattle and elsewhere. The Seattle office was in charge of the district manager. It was a booking office to solicit and book cargo and to some extent to husband the ships,—nothing more. Mr. Dant testified regarding the nature of that branch office:

> "Well, it is a traffic office used principally for soliciting and booking of cargo.
>
> Q. Does it have any power to make decisions about the operations of ships?
>
> A. No." (Tr. 2916).

The local head of this office was a Mr. Matson and he had an assistant named Mr. Graham,—with no authority except to husband the ships "to some extent" (Tr. 220).

Since an attempt has been made to established privity, regarding the deck stowage of cargo, on Mr. Pitzer, we mention him. He was in the Portland office and although referred to as head of the "Operating Department" really had no function except to preplan the load-

ing of cargo in a commercial operation, but always subject to the approval of the master and merely as a suggested guide to the master (Tr. 294-295, 2775).

That is in a commercial operation. In the case of the PENNSYLVANIA where, except for the barley, the whole vessel was to be loaded by the Army, Pitzer had nothing whatever to do with it.

> "Q. In the case of the PENNSYLVANIA on Voyage 6, aside from perhaps informing the Army that there was certain space available on the ship for their cargo, would you have anything to do with laying it out, or loading it, or stowing it, or lashing it?
>
> A. Not on the PENNSYLVANIA." (Tr. 2775).

As in all proper ship operations, the time of the ship's departure, the route she should take and her navigation were all the function and duty of the master and to be decided by him in his own sole discretion (Tr. 284, 285, 507, 2619).

As Mr. Vallet testified:

> "No, we do not try to operate the vessels from our office." (Tr. 285).

Both of counsels' briefs quote a single statement of Mr. Vallet's, apparently to imply the contrary of this. This is the statement:

> "When the vessel is loaded and properly stowed and bunkered, we advise the master to that effect, and leave it up to him when he should leave." (Tr. 284).

Quoted in the Insurance brief, at page 54, and in the Government's brief twice, once at page 52 and again on page 59, counsel say that this shows that the stowage of

the deck cargo was under the direct supervision of Mr. Vallet (contrary to the oft-repeated testimony that it was under the supervision of the master). The statement has been lifted out of context and misinterpreted. A reference to the record will show that when Vallet made the statement, the loading and stowing of the cargo were not the subject under discussion at all. Nobody was talking about it. They were only talking about the master's full authority to navigate his ship and decide when to leave port (Tr. 284-5). The statement merely means that when the cargo which has been booked for the ship is on board, and she is stored and bunkered as ordered by the ship's personnel, the master is so notified. (Not by Mr. Vallet. By "we"—whomever is husbanding the ship.) And then the master decides "when he should leave" (Tr. 284).

Furthermore, the reporter's transcription of the statement contains an error (of which there are a number throughout the whole transcript). The word "stowed" should be "stored". You do not *stow* and bunker a ship. You *store* and bunker her. The two words go together, and are complementary. To make a ship ready for her voyage, you "store" her with provisions and supplies, and "bunker" her with the necessary fuel. Then she is ready, and as Vallet said, from then on it is up to the master to decide when he should leave (Tr. 284). This corresponds with Mr. Vallet's previous testimony that one of the jobs of his department was "supplying and *storing* the ships" (Tr. 140).

So much for the general organization of the Com-

pany and its system of operating ships. Further facts in regard to the deck crack, alleged "notch sensitivity", steering gear, etc., can be reserved for our argument.

ARGUMENT

THE ALLEGED "NOTCH SENSITIVITY," OR "CRACK SENSITIVENESS" OF THE VESSEL AND VALLET'S ALLEGED PRIVITY WITH IT

Both the Government's brief and the Insurance brief allege this, and therefore we shall treat them together. The substance of the charge is that the 22-foot deck crack on Voyage 5 gave notice to Vallet that the vessel was notch-sensitive, and that he did not make adequate examination of the vessel afterwards in face of that warning. And that if he had, he would have discovered a notch sensitivity, where the 14-foot crack subsequently developed, and could have done something about it. This argument necessarily centers around that crack. The Government brief even quotes the finding of the Trial Court that the crack sensitiveness was "by reason of", i.e., caused by the 22-foot deck crack, which as we have shown in our opening brief, is without any testimony whatever.

To consider this question we have to determine whether the vessel was notch-sensitive at all. We do not think the proof sustains that. The 22-foot deck crack was explained by Vallet to be the result of a combination of three unfortunate factors, — (1) very heavy weather, (2) a heavy deck load of Jap squares, concentrating stress at that point, and (3) the incipient crack

where the padeye had been, which started the fracture. Mr. Williams showed that this steel met all the standard requirements.

The only other evidence would be the 14-foot crack in the port side, but since that occurred in the greatest storm in thirty years and not in any *steel* of the vessel, but in a *butt weld,* that can hardly be accepted as proof that the vessel was notch-sensitive. Especially in the face of the testimony of Mr. Williams above referred to (Tr. 1859, 1869, 1875, 1877-1878).

We discount the testimony of Mr. Hechtman since, as shown in our opening brief, it was based on an entirely false hypothesis of a hog, and since the little tiny deck cracks at the padeyes, which he took as evidence of strain aging, due to the hog, are not at all unusual and are found in nearly all vessels (Tr. 2745, 2885-2886). And had nothing to do with the 14-foot crack.

Now to consider Vallet's alleged privity, let us see what he did. When the vessel arrived in Portland with the 22-foot deck crack, Voyage 5, after conferring with the American Bureau and the Coast Guard, he prepared specifications for the repairs in accordance with their and his own experience, which specifications were agreed on by all, and those repairs were fully carried out by the Albina Yard, a reputable ship-repair yard of fifty years' experience.

In those specifications he included a requirement that samples of the steel be sent by the repair yard to the Coast Guard and the American Bureau (Exh. 10). This was in accord with a requirement of the Coast

Guard, applicable to all shipowners, to enable the Government to study the problem of fracture. It is, however, further evidence of his care to do everything required. These are the samples Mr. Williams tested.

The repairs consisted of inserting new plates where the crack was wider and veeing out and welding it where it tapered to a hair-line. When the repairs were finished they were hose-tested, examined from both above and below decks, and found to be complete. All—the American Bureau, the Coast Guard, Vallet, the repair-yard, the U. S. Salvage Association, and Lloyds—agreed on this and later Mr. David P. Brown, Vice-President and Technical Manager of the American Bureau, and a member of the Ship Structure Committee, and Captain Nordstrom, testified that the manner of carrying out these repairs was in every way proper. Nobody questioned the method except a Mr. Godfrey, in a minor matter. Vallet testified that the ship was better than before because the incipient padeye crack had been removed (Tr. 215). The Trial Court has found that this 22-foot crack was "fully repaired". The "girth area" of the ship, which Mr. Brown and others testified included all area where the effects of the crack might have been felt, was examined, and as Vallet said on "close inspection" (Tr. 165), a tiny suspicion of a crack was discovered where a padeye had been on the port side, symetrically opposite where the deck-crack had occurred. This was removed and an insert plate put in. The whole deck, even the plates underneath the housing, and this whole area of the ship, were "thoroughly exam-

ined", and hose-tested, and no defects found (Tr. 266-269).

Nobody suggested then, and no witness at the trial suggested since, that an examination of the whole ship should be made, not even Mr. Hechtman. It is only counsel who now suggest it.

The vessel then sailed across the Pacific and back. No trouble was experienced of any kind, either where this crack had been or anywhere else.

Mr. Matthews, as Chief Engineer, his first assistant and the mate, pursuant to the Company's regular practice of holding ship-officers responsible, examined the empty holds of the vessel and accessible places on the return Voyage No. 5, examining for cracks, or excessive rust, or hatch boards broken, or "anything", found nothing and made an official report to the office to that effect (Tr. 379-380).

Mr. Matthews also testified that the place on the port side where the crack occurred between Frames 93 and 94 was right at, and formed the side of, his machine shop and storeroom in the engineroom, and that his work put him "right up against it sometimes", and he never saw any defects (Tr. 349-350).

The vessel was drydocked at Todd's in Seattle and a drydock examination made by the American Bureau, the Coast Guard and Mr. Brenneke, Mr. Vallet's assistant. All was found in order.

The foregoing is a narrative of the facts. We now take up the various contentions regarding "crack sensi-

tiveness' or notch sensitivity (Govt. Br. 35-41; Ins. Br. 39-50).

First, the Government's brief contends, on page 36, that no inspectioon of the padeyes on the deck was made after February, 1951, and prior to Voyage 5, and that such inspection would have disclosed the incipient fracture that later spread into the 22-foot crack on Voyage 5. It is hard to see what that has to do with the case. It was certainly disclosed when the 22-foot crack occurred. That crack did no harm, was fully repaired, and is now behind us. In fact, according to opponents, it must have been a *good* thing, because it served as "warning".

The Government next contends that the "ESSO MANHATTAN" should have served as a warning. It is a little difficult for us to understand the Government's brief on this point, but apparently that is their contention. It is hard to see why. The "ESSO MANHATTAN" was a tanker. Tankers by their construction are much more susceptible to cracking than Victories. The cracking of one tanker out of a fleet of many hundreds is not a warning to anybody of anything. Certainly not to a Victory. Counsel have stressed the point, which they say is a fact, that this deck crack in the PENNSYLVANIA was the first crack of a Victory in two thousand ship-years. This good record of the Victories, rather than the isolated tanker "ESSO MANHATTAN", was the fact confronting Mr. Vallet. The Victories are good.

The "ESSO MANHATTAN", however, does bring up a subject well worth noting. As disclosed in that case, fractures are of two kinds. One is a "shear" fracture

where the metal simply parts because, good as it is, it cannot stand the stress put on it. The other kind is a notch-sensitive fracture, which occurs because the steel is notch-sensitive. The two kinds of fracture are identified by marked characteristics. In the case of a "shear" there is a clean break. In the case of a notch-sensitive fracture, diagonal "chevrons" are left on the metal, which identify it as such. These chevrons were clearly discernible in the "ESSO MANHATTAN", and consequently it was decided that the fracture was from notch-sensitivity (121 F. Supp. at pages 774-775). In the case of the PENNSYLVANIA, however, since the ship was a total loss, no evidence remains as to *what kind of a fracture it was.* The steel being gone and the chevrons lacking, there is no proof at all that it was notch-sensitive. It may just as well have been a shear fracture caused by an overstrain of the metal in the midship section of the ship where the "bending moment" is greatest, as the ship alternately is buoyed in its center on a wave, or depressed in its center when its weight is sustained by waves fore and aft.

This is an important point since the burden of proving this unseaworthiness and notch-sensitivity was always on claimants.

Incidentally the notch-sensitivity, resulting in the crack in the Esso Manhattan, was held by the court to be a latent defect, for which the shipowner would not have been liable under the Carriage of Goods by Sea Act, 1936.

It is next contended by the Government that after

the 22-foot crack "immediate and exhaustive tests of the steel of the PENNSYLVANIA" should have been made. But what would such tests have shown? They would have shown that the steel, as Mr. Williams, the Government expert, himself admitted after making his own tests, fully met the accepted standards and requirements. Furthermore what "immediate exhaustive tests' could have been made? All the witnesses, even Mr. Hechtman and Mr. Williams, agreed with Mr. Brown, (1) that the test of one steel plate is no test of the plate next to it, or of any other plates in the ship, and (2) that there is no "non-destructive" test known, to determine notch-sensitivity. The only test is to cut a plate in pieces and take it to a laboratory for a laboratory test. What would claimants have had Vallet do here? Chop the ship into pieces?

The problem of "brittle fracture" has been, and still is the subject of intensive research by the American Bureau and the Government agencies. It is still unsolved. A great deal of money, and all the resources of the Government have been spent on it (Tr. 2810). Is Mr. Vallet supposed to be superior in his knowledge to all of these? And to be held accountable accordingly?

The Government's brief, on page 39, mentions Exhibit 185, and the Insurance brief, on page 41, mentions this and also Exhibit 189. These are reports of the Ship Structure Committee, and the suggestion is that they should have put Vallet on notice about notch-sensitivity. Exhibit 189, however, was not published until November, 1953 (Tr. 2812), nearly two years after the wreck.

Exhibit 185 concerned primarily Liberty ships, rather than Victories (Tr. 2766-67). It said this:

> "A tendency for certain ships to incur repeated casualties can be measured, but the trend is not great, and the effect is not significant." (Tr. 315).

It is hard to see how any such statement as that could put Vallet on notice of *anything*. In the first place, the PENNSYLVANIA was not a Liberty. In the second place, she had not suffered "repeated casualties". The 22-foot crack was the first. In the third place, the Report says that the effect of even *repeated* casualties "is not significant". Mr. David P. Brown agreed (Tr. 2742). Of all the witnesses who testified, he is the most informed, and the highest in repute. He said that certain ships do show a tendency toward repeated fractures, but the trend is *very insignificant,* and might be accounted for by other factors which would cloud the issue (Tr. 2742). Again: Referring to a vessel that has cracked, he said: "In so far as the vessel is concerned, we have never been able to establish any significance." (Tr. 2743). And that in his opinion the PENNSYLVANIA was seaworthy (Tr. 2809).

Both briefs mention the fact of incipient cracks where padeyes had been removed from the deck of the PENNSYLVANIA. What of it? (1) They had all been repaired. (2) They are quite common on vessels, do not affect their seaworthiness (Tr. 2745, 2885-86), and (3) they have nothing to do with this case anyway. For the only crack that occurred during the storm was in the vessel's *side,* not on the *deck,* and was in fact separated from the deck by a crack-arresting gunwale bar, and

was not in a plate at all, but in a *butt weld*. The suggestion that certain padeyes on the forward deck, to which cargo lashings where fastened, may have developed cracks during the storm is pure speculation. There is no evidence of it whatever. Besides cracks usually occur, if at all, amidships (Tr. 2603, 2777).

The Insurance brief suggests (pp. 41-48) that the examination of the vessel made immediately after the repair of the 22-foot deck crack was inadequate and incomplete and makes the same contention in regard to the drydock inspection later at Seattle, and both briefs contend that the inspection on the drydock was incomplete because information as to the prior 22-foot deck crack was withheld from the inspectors.

First, as to the examination made at Portland immediately after the repairs:

The Insurance brief quotes certain incomplete excerpts of Mr. Vallet's testimony, out of context, and from it argued that he, himself, set up a standard by which, after the deck crack, the vessel should have been put on drydock, completely unloaded and thoroughly examined, taking four or five days. These excerpts show how necessary it is for the Court to read not only what is quoted, but what is left out.

Here are the quoted excerpts:

> "Q. When it comes to making an inspection of a hull, and I am talking about a detailed inspection, you would require, first of all, I understand, Mr. Vallet, that the vessel be *completely unloaded?* (Emphasis supplied.)
>
> A. That is right.

Q. And it should be on dry dock?
A. For a complete inspection, yes.
Q. For a complete inspection?
A. Yes." (Ins. Brief 41).

Counsel have omitted Mr. Vallet's answer to the next question, the answer being that Mr. Vallet had in mind not only the inspection of the hull, but "Complete inspection including all *machinery and equipment, yes.*" (Tr. 227).

Counsel next quote this:—

"Q. How long would it take you to make a detailed and thorough hull inspection of the vessel?
A. It would take about four or five days." (Ins. Brief 42).

The immediate context, however, shows that he was talking about hull and all machinery and equipment (Tr. 227).

The foregoing testimony all related to a thorough and detailed examination of a ship, hull, machinery and equipment, by one contemplating its purchase (Tr. 224-227). Counsel then jump to an examination of a vessel after a crack. Here was the testimony:

"Q. When there was a serious crack, then that meant to you, did it not, that a thorough examination must be made of that vessel?
A. Yes." (Tr. 272; Br. 41).

It is obvious that here Vallet is talking about an entirely different thing, viz., an examination, not of the whole vessel, but only that part which might have been affected by the crack, viz., the "girth area", which is the only examination, as all the experts agree, that is necessary (Tr. 306, 2780-82, 2802-4, 2899-2900).

There is thus no foundation for the claim that the examination, after the 22-foot crack, should have taken four or five days on a drydock, and was inadequate.

It is next contended by the Insurance brief, page 43, that Vallet failed to direct a thorough examination of the vessel on the drydock in Seattle, and failed to attend that vessel in Seattle personally, and gave Brenneke, his assistant, no instructions for a thorough examination. It is hard to know just what is meant by this. The examination, together with the prior annual inspection in August, (the two, annual and drydock, examinations together make up the complete examination of a vessel), consumed the four days previously stated by Vallet as about the time required to make an examination. The drydock examination, by itself, took one day, which accords with Vallet's testimony that that is the time required (Tr. 229).

His personal absence from the drydock examination was not a "failure". There was no reason for him to be there. Mr. Brenneke, a thoroughly competent man, was there in person, and himself, along with the Coast Guard and American Bureau inspectors, made the inspections. Mr. Brenneke certainly needed no specific instructions. He knew all about the ship, including the 22-foot crack, and he knew what an inspection should be (Tr. 270-271).

> "The petitioner cannot be deprived of the right to limit liability because Mr. Berg did not give detailed instructions of the manner in which the work of installing the gas bag was to be performed to a marine engineer, one supposed to be skilled in such work, and so competent that he was the yard en-

gineer in the repair department." The Columbia, 25 F. (2d) 518 (C.A. 2, 1928).

It is next contended by both briefs (Ins. Br. 43-44 and less so by Govt. Br. 39) that the drydock inspection was inadequate because the Coast Guard inspector, Hamilton, and the American Bureau inspector, Wilson, were not informed of the 22-foot deck crack prior to their inspection, and apparently argue it as a personal faul of Mr. Vallet. In the first place, it should be observed that any instructions or information to these men would not come from Mr. Vallet, but from their own superiors in their own organizations. In fact, Wilson's answers show that he would rather resent instructions from any outsider (Tr. 769). In the second place it should be observed that it would not make any difference whether they knew about the crack or not. Their duty is to make a thorough inspection regardless, and not take any instructions or suggestions from anybody.

In the third place, the crack had been fully repaired, the ship was "in the same condition as before" (Tr. 897), and the prior crack was of no consequence.

In the fourth place, they probably knew of the crack because it was in their own Coast Guard and American Bureau records, and in the log of the ship, which they were inspecting, and they were accompanied by Mr. Brenneke who knew all about it.

But these are preliminaries. The more important thing is that there is no testimony whatsoever to support a claim that they did not have such information.

Counsel did not ask these men fairly and openly whether they knew of the 22-foot crack or not. Their attention was never focused on that at all. Instead, by a series of covert questions designed to hide their true intent, these men were asked whether they had any "special information" or "special instructions" in regard to examining the PENNSYLVANIA, and whether they had had any reports of anything "unusual" about her (Tr. 684-685, 768-769). That is all. (Commander Brown, the hull inspector, was not asked anything one way or the other.) These men said they did not have any "special information" and knew nothing "unusual" about the ship. Well, of course not. The crack having been repaired, the ship as good as she was before or better, there was nothing "unusual" to report. Mr. Wilson, the A. B. Surveyor, testified that he consulted his Bureau files on the ship before he went down to inspect her, and there was nothing "outstanding" against her (Tr. 769). As this Court knows, an "outstanding" item on a ship is something needing attention or repair to keep her "in class". On this flimsy basis, counsel have argued, not merely that these men did not have this information, but that it was "withheld" (Ins. Br. 44).

A final suggestion is made in the Insurance Brief that the inspection was incomplete because there was some cargo remaining in the ship at the time (Ins. Br. 47). There was a small amount of steel plate and general cargo in the ship, the small amount of which can be determined by inspecting the vessel's log for Voyage 5, showing the time spent in removing it by stevedores. But regardless of that, we have two noteworthy fac-

tors.—(1) All these experienced men regarded the inspection as complete and satisfactory. (2) The 14-foot crack which occurred on the port side during the storm was *not* in a cargo space at all. It was *in the engineroom,* and Mr. Wilson testified that he inspected "the *engineroom* and the boiler spaces" (Tr. 769).

Commander Brown was the *hull* inspector for the Coast Guard, and his testimony is particularly noteworthy because it is a crack in the side of the *hull* that we are discussing. He explained that he examined not merely the underwater body, but the sides of the ship as well,—the "whole hull' "from the keel up to the deck" and "from stem to stern" (Tr. 733, cf. also 735-736).

To sum it up, these men went all over the vessel, examined all her plates, seams, welds and everything pertinent to a complete hull examination, had hammer-testing hammers along to use on anything that looked suspicious, examined not merely the underwater body, but the whole hull, and found the vessel completely seaworthy in every respect. They were all competent, qualified men of long experience.

No witness has suggested what other kind of inspection should have been made, or that it would have discovered anything.

A few statements in opponents' briefs remain to be answered, and then we are done with this subject of the hull's alleged notch-sensitivity and Vallet's privity with it.

On page 40 of the Insurance brief it is said that the

vessel, prior to her purchase, had sustained "serious and extensive damage to hull and frames"; that Vallet knew of this; and that when steel "is indented to any serious extent" is become subject to "strain aging" and eventually to notch-sensitivity.

The answer to this is two-fold:—

(1) The damage previously sustained by the vessel was nothing unusual, but more or less of the type suffered by all vessels in the routine of their service (Tr. 2746, 2871) and was all fully and completely repaired so that the vessel at the time of her purchase by petitioner was, as shown by the Condition Survey, and as testified to by all, without contradiction, as good as before, and complete seaworthy.

(2) The only "indented" plates anywhere near the crack subsequently developing between Frames 93 and 94 were shell plates J-9, J-10 and J-11. J-9 and J-10 were not even close to it. The after end of J-11 butted on the girth seam where the crack started, but all of these plates, including J-11, were *renewed*. They were not faired in place. They were taken out and *new ones* put in their place (Tr. 605, 606, 2583-4, 2614). The possibility, therefore, that any indented plate could have undergone strain-aging at this point must be eliminated. Incidentally, the weld where Plate J-11 butted on the girth seam which ultimately cracked was thoroughly inspected by Commander Rivard, hose-tested and found to be good (Tr. 612-613), and survived five arduous trans-Pacific voyages and a drydock inspection without disclosing any defect.

Another item requiring brief comment occurs on page 45 of the Insurance brief, where it is said that the drydock inspection was not availed of "to determine the *effect* of the Voyage 5 Class I hull fracture upon the structural integrity of the vessel's hull". This is a recurrence of an idea that we disposed of in our opening brief. The Voyage 5 22-foot crack would have no "effect" on the structural integrity of the vessel, particularly no effect on the hull some 90 feet away where the crack subsequently occurred in the port side. Vallet testified and was supported by others that the 22-foot crack would *relieve* stress tensions on the deck at that point, and when repaired the ship would be better than before. Not even Hechtman claimed that the Voyage 5 crack would have an "effect" on the structural integrity of the hull. The most he could claim for it was that it "could be" *evidence* of a strain produced by the previous alleged hogging (Tr. 2603).

Finally all agreed that strain-aging, which produces notch-sensitivity, can only occur, as its very name implies, after an "age" has gone by. It takes time to develop. As Mr. Brown said, it occurs where material has been strained and "allowed to age" (Tr. 2747), and Mr. Hechtman added the same qualification. He said it occurred where material has been permanently deformed and "a period of time has elapsed" (Tr. 2370). It is obvious that the period between November, 1951, when the deck crack occurred, and January 9th, 1952, when the port side crack occurred, is too short a time for any "strain-aging" to take place.

For these many reasons it is clear that the deck crack could have no "effect" on the vessel's "structural integrity". This is the same error into which the Trial Court fell when he said that the "crack sensitiveness of the vessel" was "by reason of" the former 22-foot deck crack (Findings of Fact V, Tr. 75-6). We commented on this in our opening brief.

Finally, the Insurance brief suggests on pages 49 and 50 that since there was no deck cargo in the vicinity of No. 1 hatch (to break loose and tear off the hatches), and since water entered No. 1 hold, it must have entered through some substantial break or leak in the ship's hull or deck in the vicinity of No. 1 hold. Of course this is pure speculation. The pounding seas themselves could have smashed in No. 1 hatch, wrecked its coamings or torn off deck fittings. The violence of the seas is utterly unpredictable. Or some act of the crew, after leaving port, may have created an opening or left off some fastening in the forward part of the ship. This is all pure speculation. (See our opening brief, pp. 108-9.)

The brief suggestion is made on page 39 of the Government's brief that the petitioner could not depend on inspections by the Coast Guard or marine surveyors because petitioner could not delegate its duties. This is, of course, not true. The marine surveyors and the A.B.S. surveyors are employed by, and are agents of, the petitioner (Tr. 2760-62). The rule about delegation is well understood, A corporation, of course, can act in no other way than through delegation. It can delegate its

duties to use due diligence, and if its delegates do so, the shipowner has done all he can, and is exonerated. This rule of delegation applies to the Harter Act and COGSA cases. In limitation cases, however, the rule is broader. The shipowner can delegate all his duties regarding the ship, and if he selects competent men as delegates, he is exempt from liability, even should they fail in their duties, provided he is not personally aware of their failure and does not sanction it. This Court knows that there are many cases where the shipowner's reliance on the Coast Guard and American Bureau has been upheld by the courts:

The Zarembo, 44 F. Supp. 915, 919.
The Floridian, 83 F. (2d) 949.
The Amelia, 13 F. Supp. 7.
The Troubador, 88 F. Supp. 207.

Finally, the Government brief, page 41, says that Vallet should have warned Captain Plover of the PENNSYLVANIA of the crack sensitiveness of the ship. This is pretty hard to understand. The "warning" of the crack sensitiveness, as claimed by claimants, was the 22-foot deck crack. Plover knew all about it. He was on the ship when it occurred.

PETITIONER'S ALLEGED PRIVITY

So far the discussion has all related to notch-sensitivity resulting in the 14-foot crack. Claimants try to fasten privity on petitioner through Vallet, and to a secondary and much less degree, on Brenneke.

First, as to Vallet:

It is hard to see what he did that he should not have

done, or what he omitted that he should have done. He operated under the well recognized principle of holding the ship's master, chief engineer and officers responsible for their ship, reporting to him, and he enforced that system and, by his staff, made additional inspections and diligently took care of everything thus disclosed. In fact, as to the PENNSYLVANIA, there were no adverse reports at any time except the 22-foot deck crack.

As to that crack he did everything that any mortal man could have done. His actions met the approval of all concerned, himself, his officers, the Coast Guard, the American Bureau, the repair yard, the U. S. Salvage Association, and Lloyds, and later the approval of Mr. D. P. Brown and Capt. Nordstrom. The ship when repaired was, as testified to by all, as good as before. The crack was not a warning of anything. No "tests" that he could have made would have shown anything except what Williams' own tests showed,—that the steel more than met all requirements. No non-destructive test is known. He certainly could not chop the ship to pieces to make laboratory tests of each plate.

He was not privy to the drydock inspection in Seattle, although if he had been, it would have made no difference for that inspection was good. He sent Brenneke, one of his experienced and competent assistants, to represent him there. No adverse reports were made, as indeed there could not be, since the vessel was all right.

As to Brenneke, it is plain that no privity can be fastened on petitioner through him. The only thing claimants attribute to him is the drydock inspection in

Seattle. But the proof is that that inspection was good and complete. There is no proof whatever that a further or different inspection would have disclosed any weakness in the butt weld where the 14-foot crack later developed.

That he was not of such rank in the hierarchy as to convey privity is plain. He was merely one of Vallet's staff of assistants, and as he, himself, put it in one place, —"My job mainly was to do the footwork. I was just chasing from one place to another on attendance to vessels", etc. (Tr. 322). How much "sail he packed"—to use one of his expressions (Tr. 1726)—is indicated by the Trial Court himself, who said, "He seems to be a very minor official in the organization" (Tr. 1727).

STEERING GEAR AND VALLET'S ALLEGED PRIVITY

On pages 32-39 of the Insurance brief, and pages 41 to 51 of the Government brief, the arguments go as follows:—

(1) For a time the steering gear completely failed in the storm,

(2) Because of unseaworthiness (without specifying what),

(3) Petitioner did not use due diligence.

(4) Vallet was privy to this lack of due diligence.

(5) As marine superintendent his privity is that of petitioner.

In our opening brief (pp. 102-103), we show, we believe, that the Trial Court overstated the meaning of

the radiograms when he stated that the ship was unable, for a time, to steer by any method. We also showed that the failure of steering gear in a tremendous storm is no proof of unseaworthiness at the inception of the voyage, and that the Court nowhere stated what the claimed unseaworthiness was. We will not go into that again.

We come now to the simple question of privity.

First it is contended in the Insurance brief, pages 32-3, though not in the Government brief, that Vallet was personally present and therefore privy to the hard-turning of the rod leading from the steering wheel on the poop deck down to the steering engine in the engineroom below, when some army clothing got wrapped around it, and that nothing was done to prevent a recurrence of this, and that was his personal negligence. It is suggested that "no protective shield or guard was installed, and no other action was taken to prevent a recurrence of this difficulty should the cargo shift again in the future".

No one suggested a "protective shield or guard" and no witness suggested it at the trial. It is simply a product of counsel's invention.

> "The use of that device (a fuel tank ventilator) was not required by the supervising inspector, . . . We do not think that the steamship company was bound to adopt this device, or any device not dictated by their own knowledge and experience, or that of others, or that its failure to do so was negligence." McGill v. Michigan S.S. Co., 144 Fed. 788 (C.A. 9, 1906).

The army clothing did not put the rod out of operation. It merely made it turn hard. The Coast Guard which was present approved of what was done, merely removing the clothing.

The matter is of no moment anyway because, as Matthews explained, the rod was only for steering from the exposed poop deck where no one would have stood in the storm, and the steering engine could be equally operated by a man in the steering engineroom itself (which would be the natural place in a storm) (Tr. 372-373, 376-377).

Furthermore the stowage plan (Exh. 187) for Voyage 6 shows that the after end of No. 5 hatch, through which the rod passed, was stowed with tomato juice, extinguishers, syrup, bags, flour and canned goods, in boxes or cartons, and not with any loose clothing or anything else.

Finally, the radiograms show that hand-steering gear in the room below was actually operated.

To succeed on this point claimant would have to show that inability to use this rod from the *poop deck* caused the loss and arose from Vallet's personal lack of due diligence. No such showing is possible.

It is next contended in the Insurance brief (pp. 33-8) and in the Government brief (pp. 41-49), that the inspections of the steering system of the ship were inadequate. The Government brief even went so far as to say that there was no proof that the "hand steering gear or emergency steering were even operationally tested"

(p. 44), and that "there was no evidence produced as to when the hand steering had been actually operated". Such statements as these and the whole charge that the steering gear was not adequately inspected can only have resulted from counsel's failure to remember the testimony. That testimony we shall now recall. Commander Hamilton, who inspected the steering system along with Lt. Rojeski at the Annual Inspection August, 1951, described in some detail the tests of the telemotor steering system from the bridge to the steering engine (Tr. 658-9). He then spoke of the steering station on the poop deck, which, by means of the rod referred to, operates the steering engine in the room below, and said:—

> "Q. Did you make a test of that steering arrangement?
> A. We did.
> Q. How did it work?
> A. Good." (Tr. 660-661).

He then described the steering station inside the steering engineroom itself, and said:

> "Q. Did you make all these tests on this ship that you have described?
> A. Between the two of us with the officers aboard the ship; yes, sir.
> Q. And the result was what?
> A. The steering engine was in good condition.
> Q. Did the Chief Engineer assist you in this?
> A. The Chief Engineer made all the changes, started the motors, stopped them, and made any changes necessary to operate the steering engine from all stations." (Tr. 661-662).

He also described the hand-powered pump that can be used to maintain hydraulic pressure on the steering-engine rams if the electric motors, which normally per-

form that function, fail (either one of the motors is sufficient), and testified:

"Q. Was that in working order?
A. Yes, sir." (Tr. 668).

Similarly Lt. Rojeski, at the same annual inspection, referring to the entries in his inspection book, testified:

"Q. What does the record show there as to your tests and the condition you found the steering engine to be in?
A. Well, the steering engine tested and found in working order: 'Yes'.
'Steering gear examined from pilothouse to rudderhead and found in good condition, Yes.'
'Hand auxiliary steering gear tested and found in good working order and efficient, Yes.'
Q. What condition did you find the steering—the whole steering apparatus of the ship to be in, all-inclusive?
A. Good, sir." (Tr. 708).

Mr. Miller, the American Bureau Surveyor, testified that at the annual survey in August, 1951:—

"A. I examined the steering arrangements, which consisted of the telemotor, hydraulic pumps and the drive motors, emergency gear, and found them in a satisfactory condition." (Tr. 411-12).

Chief Engineer Matthews testified that he was responsible for the proper functioning of the steering apparatus, and then as follows:

"Q. And as such on Voyage 5, did you make inspections of the steering gear from time to time?
A. Yes, and inspections are also made every watch.
Q. By whom?
A. By the man oiling the steering engine.
Q. By the what?

A. By the man oiling the steering gear.

Q. In your inspections would you have occasions to go aft of the steering engine room?

A. I would go aft every day. I would inspect everything every day, all of the equipment that is running." (Tr. 350-1).

Finally, the log books which are in evidence show that on Voyages 1 through 5 no less than *sixty-five* operating tests were made of the steering engine and/or emergency steering gear from February 18th, 1951, to December 13th, 1951, six of which were conducted subsequent to November 16th, 1951, the day on which the extension-rod from the after steering station was freed up, the last of which entries is as follows:

"From Moji Thursday, December 13, 1951
To Vancouver, B. C.
1620 Turned emergency wheel over Hard Right & Hard Left All in Order. G. E. Elliott."

The foregoing shows that counsel's memory is faulty when they say that no adequate, complete inspections were made, particularly, as the Government brief says, that there was no evidence of tests other than those described by Commander Hamilton, and that these did not even show that the hand steering gear or the emergency steering were even "operationally tested".

Both briefs, however, direct their main attack on petitioner's supposed failure to prove that the steering engine and particularly its hydraulic pumps had ever been opened up for internal inspection. To understand this a little better, reference should be made to some testimony of Commander Hamilton, where he said that, on an annual survey, pumps are not opened up unless it

proves, in operating them, that they are not in good working condition:

> "Q. So that if it does operate all right when you watch it you do not open it up?
>
> A. Except on the four-year survey. It is not required at the annual inspection." (Tr. 687).

Commander Hamilton is here referring, not to any Coast Guard Regulation, but to the four-year Special Survey required by the American Bureau if the vessel is to be retained "in class". The distinction should be noted between a "survey" and an "inspection". "Surveys" refer to American Bureau surveys; "inspections" refer to Coast Guard inspections. The Coast Guard does not make four-year special inspections, but only annual inspections, unless something special develops. The American Bureau special surveys made at intervals of approximately four years are denominated "special Survey No. 1", "Special Survey No. 2", "Special Survey No. 3", and so on. We believe this Admiralty Court is familiar with all this.

It is not clear from the context of Commander Hamilton's testimony whether he is talking about pumps in general all over the ship or pumps at the main steering engine, but counsel have assumed that he is talking about the latter, and therefore we shall go along with them on that basis.

Now it is true petitioner did not offer any proof of the 4-year special survey, and its concomitant opening up of the steering engine and its pumps. This occurred two years before the petitioner bought the ship. It

would be going further than anything we have ever heard of in some forty years of admiralty practice to require a shipowner to prove, in order to show due diligence, that all surveys had been made and all due diligence shown by the previous owner for years back. Especially when the ship's current certificates show her to be "in class" and in all respects fit. The law does not go to such extremes. It only requires due diligence to make the ship seaworthy at the inception of the voyage, which certainly, by any stretch of the imagination, should not go back to a period before the shipowner even owned the ship. So we furnished no proof. And the matter was not even brought up at the trial. It is an afterthought now.

If, however, such proof is desired, claimants have supplied it for us. For if the Court will turn to their own Exhibit 147, which is a collection of American Bureau surveys which they introduced, the Court will find Report No. 8815, dated at San Francisco, California, February 3, 1949, and being the "Completion of Special Periodical Survey of Machinery". It is there stated in Item 3:—

> "Hydraulic pumps on the steering gear were opened and examined; rams and cylinders examined and all found satisfactory. Steering gear was tried out under working conditions and found to operate satisfactorily."

To conclude:

The Trial Court has not found what the supposed defect in the steering apparatus was; or that it existed at the inception of the voyage; consequently, no one can

say what caused the loss in this respect, nor that due diligence was lacking. On the contrary, the proofs show due diligence.

But casting all that aside, Vallet's lack of privity is clear. The only incidents he personally came in contact with were the inconsequential freeing up of the poop-deck steering rod when it was fouled by the army clothing and the annual survey in August; though not directly making examinations himself, that survey and inspection being the province and duty of the American Bureau and the Coast Guard. It was *their* survey, and *their* inspection,—not his.

He worked under a system of holding his ship's officers responsible. They never made any adverse reports to him of any trouble with any part of the steering gear. There is no possible privity.

SECURITY OF THE HATCHES AND STOWAGE OF DECK CARGO

The Insurance brief discusses these matters on pages 50-58, and the Government brief on pages 51-9. The substance of their charges is that the forward hatches were not adequately secured and the label cargo should not have been carried on the forward deck. It is even suggested that no deck cargo should have been carried at all.

We have discussed these matters in our opening brief on pages 44 to 73, and shall not repeat that discussion. We confine ourselves to "privity".

We shall answer the Insurance brief first. It claims that with bilge strainers covered by burlap there would be no way of pumping water out of the hold; that therefore additional precautions should have been taken to secure the hatches, and that this would have included the use of chafing gear to prevent *cross-battens* from cutting the tarpaulins, that Modern Ship Stowage (Exh. 172) specifies the use of chafing gear, and that none was aboard the PENNSYLVANIA, and this was Vallet's personal negligence (p. 52).

Incidentally, burlap coverings over the bilge strainers are the common practice to prevent grain from entering the bilges. This burlap would not prevent any ordinary water that leaked down through the grain from entering the bilges if the water got that far and was not absorbed in the grain itself. Of course with a whole hold full of water, the point becomes immaterial.

But now regarding the charge that no chafing gear was aboard, there is no testimony whatever to support this. Counsel must base that statement on some testimony of Mr. Vallet's where he was enumerating various items making up the covering of a hatch (Tr. 307), and did not specifically mention chafing gear, nor was he asked about it. But the omission to mention it means nothing. Chafing gear is nothing but old rope, rags, sacks, or anything to prevent the chafe. It can be picked out of any of the ship's stores and is not a regular part of the hatch appliances. Contrary to the statement that no chafing gear was aboard, is the clear implication in Mr. Vallet's subsequent testimony that it was. For when

he was asked whether cables across the hatch in heavy seas would not tear the tarpaulins, he said,—

> "A. Not if a suitable chafing gear is placed in the way of the cables." (Tr. 308).

Furthermore he had testified elsewhere that the ship was fully and completely supplied (Tr. 291). Chafing gear would be among the supplies. It is inconceivable that the ship had no extra rope or canvas, bags, sacking or many of the miscellaneous items that could be used as chafing gear. "Knights Modern Seamanship", 10th Edition, defines "Chafing Gear" as "A guard of canvas or rope around spars or rigging to take the chafe", and a "Chafing Mat" as "A mat woven from strands of old rope and used to prevent chafing" (p. 787).

Even if you accept the impossible that there was no chafing gear aboard, Vallet would not be privy to such a fact. That would be the province of his ship's officers on whom he relied.

The whole thing is an after-thought, never brought up at the trial and now advanced for the first time.

Counsel is mistaken in saying (Ins. Br. 52) that Modern Ship Stowage specifies chafing gear to prevent the *cross-battens* from wearing or cutting the tarpaulins. Modern Ship Stowage says nothing of the kind. It cites some Underwriters' Rules that chafing gear should be used under *wire cross-lashing;* which is what Mr. Vallet said. In fact the use of cross-battens instead of cross-lashings, eliminates chafing gear.

It is next suggested that Mr. Pitzer was negligent

in making the ship available to the Army to carry any deck cargo at all, and particularly the label cargo forward, and that Pitzer was privy to this. What we have said in our opening brief, and this brief, sufficiently answers this. Even in a commercial operation Pitzer did not occupy a position high enough to transmit privity to the Company, and in this case, he did nothing at all except possibly inform the Army that the vessel, except for the lower holds where barley was, was available to them for loading under their contract. He made no decisions where any cargo was to go, and did not know where it went. The suggestion that he must have known where the label cargo was, from the reports of the supercargo on the ship to the Seattle office, and so on to Pitzer in Portland, even if it were material, is without foundation. The supercargo apparently reported only how the loading was progressing so the Seattle office would know when the ship was likely to depart. He did not even report to the manager of the office, but to a Mr. Graham, an assistant (Tr. 1162-63). Even if Pitzer had known of the deck cargo, it would not have made any difference. That was up to the Army and the Master.

> "The amount of the deck cargo shall be at the discretion of the Master and the loading (when performed by the Government or its Agents) and carriage thereof shall be at the risk of the Government." (Exh. 132-B).

CROSS-BATTENS

It is next contended that the cross-battens on the hatches were bent and that this was the personal fault of Vallet.

We discussed this in our opening brief (pp. 119-120), and there showed that they were not bent or defective. We did not quote the testimony which showed this, but cited it, viz., Allison (Tr. 1091-4), Captain A. B. Johnson (Tr. 1188-1208) and Captain Sheldrup (Tr. 2697). We refer the Court particularly to the testimony of Captain Sheldrup because he was the Government's own supercargo, was right at Hatch No. 1 when they opened it and rebattened it, and was right at No. 2 Hatch after it had been battened, and found the cross-battens all right. We quote Sheldrup's testimony in part:—

"Q. Are you familiar with the so-called crossbars or cross battens with which Victory ships are fitted?

A. Yes.

Q. In connection with the securing of the hatches?

A. Yes, I am.

Q. Have you seen them?

A. I have seen them on all ships, yes.

Q. Let's take No. 1 hatch. Do you recall whether or not that night you had occasion to reopen and put any cargo into No. 1 hatch prior to the vessel sailing on the morning of January the 5th?

A. The No. 1 hatch was intended to be finished on the day shift. However, there was some space left in there, and we thought we were going to leave it that way—the day crew did—so they left it that way and the crew battened that hatch down.

Q. Yes.

A. And then towards night, well, I saw where we needed more space so I told—the boatswain was

on then, and I told him we might have to open it up again. He said, 'Fine'; it would be all right; go ahead.

We battened it down in the morning, and towards three or four in the morning I saw we needed that space, and I went down in there.

Q. Did you see that No. 1 hatch unbattened and opened up so you could put more cargo in it?

A. That is right.

Q. I will ask you whether or not you saw the batten bars on the No. 1 hatch at that time.

A. They were on there then.

Q. I will ask you whether or not they were bent, twisted, buckled or otherwise deformed.

A. As far as I could see, there was nothing wrong with them.

Q. How far away were you from them?

A. Well, I was on there when we opened them up.

Q. Was there any difficulty in opening them?

A. No.

Q. If they had been bent, twisted, broken or buckled could you have seen it?

A. Well, I probably would notice that.

Q. Why would you notice it?

A. Well, for one thing, I always pay attention to the hatches, being my main job for many years when I was sailing. And also when you open up again, why, any delay of time I have to keep a record of it.

Q. Was there any difficulty in opening that No. 1 and rebattening it?

A. No.

Q. With respect to Hatch No. 2, Captain Sheldrup, during the evening and early morning prior to the vessel sailing January 5th, did you have occasion to be on or around No. 2 hatch?

A. No. 2 was battened down when I came down.

Q. That would be on the evening of the 4th?

A. It was during the day shift; that is, the crew did it right after——

Q. Did you have occasion to be on the hatch, to see it and to be around it during the night and early morning of the 5th?

A. Yes, I was right there when they lashed—they had to lash that acid right by No. 2, so I was right there.

Q. I will ask you whether or not you on that occasion observed any bending, twisting, buckling or any deficiency in the batten bars on No. 2 hatch.

A. No, I did not." (Tr. 2694-6).

We note the suggestion, rather faintly made in both briefs, that a deck load of heavy timbers on Voyage 5 had come loose and drifted around on the forward deck (Ins. Br. 56) (Govt. Br. 54), implying that this drifting deck load had damaged the cross-battens on the hatches. Photographs, however, taken by a sailor on that voyage and introduced by claimants themselves as Exhibit 149, 1 to 5, show clearly (a) the lumber deck load was built adjacent to the hatches, not on or over them, (b) the hatches were clear of any lumber and showed the cross-battens in place, undisturbed after the storm, (c) the chain lashings of the deck load itself in place with only a few pieces of lumber on the top tier on the port side abreast of No. 3 hatch moved slightly—not "drifted all over" as the witness had testified. None of the pictures shows any part of the deck load lying on the hatches or cross-battens or out of the grip of the lumber chain-lashings. They show only that a light "catwalk" built over the starboard deck load was washed overboard by heavy seas.

As a matter of fact there is no requirement that cross-battens be used at all. They are simply an additional precaution taken by this petitioner like the addi-

tional precaution also taken by this petitioner of using the third tarpaulin for each hatch.

The Trial Court made no finding that the cross-battens were bent or twisted, or in any way defective. In fact he made no finding at all adverse to the security of the hatches.

Finally as to privity, it is plain that Mr. Vallet had nothing to do with this. It was a matter for his ship's officers, as Matthews himself testified. If anything were wrong with the battens, it would be the duty of the mate to report to the chief engineer, and the chief engineer would fix them.

Turning now to the Government brief, it begins by invoking Title 46 of the Code of Federal Regulations, § 144.10-80, which reads as follows:—

> "Security of Hatches. (a) Vessels carrying loose grain in bulk shall have suitable means of securing hatchways and other weather deck openings. Hatch covers and their supports shall be in good condition and properly battened down using good and sufficient tarpaulin, cleats and wedges where necessary."

It is hard to see why counsel cite this, for the testimony shows that the hatches complied with every word of this requirement. But regardless of that, this regulation was not promulgated until October 10th, 1952 (17 Fed. Reg. 9529), to be effective November 19th, 1952 (17 Fed. Reg. 5672), some eleven months after the loss of the PENNSYLVANIA. The attempt therefore, on page 52, to show statutory fault and invoke the Pennsylvania Rule fails.

The Government brief beginning on page 55, repeats the charge that Mr. Pitzer made the "decision" to carry deck cargo (page 55), and "the acid cargo was carried on the forward deck with the knowledge and therefore the privity of the Petitioner" (page 59).

We have already answered this. In the first place, it was properly carried. It *had* to be carried on deck under Coast Guard Regulations. It was the decision of the Master and the petitioner had nothing to do with it, and there is no proof that it was this cargo which came adrift and took the tarpaulins off the hatches.

To conclude: The hatches were well secured; the cross-battens were good; chafing gear, through not necessary for cross-battens, was aboard; the deck cargo was proper. The Trial Court did not find anything specifically against either the hatches or the cargo. Neither Vallet nor Pitzer was privy to any of these things.

CREW

One final comment on the Government's brief. It is there stated on page 63 that no sufficient explanation was ever made of the fact that petitioner's Marine Casualty Report (Exh. 24) showed only five ablebodied seamen, instead of six, the inference apparently being that the vessel sailed with one A.B. short of the required number. Although immaterial, we cannot let this pass unchallenged. The record contains a full and complete explanation. We refer to the testimony of Crockett (Tr. 774-782) and Trenholme (Tr. 934, 940). From this it appears tht a clerk in the Claims Department of the

petitioner made up the Marine Casualty Report (which must be done promptly, Tr. 781), taking his information from a payroll (Exh. 58) of the Company. This was before the official crew list (Exh. 25) had been received from the Customs. That payroll listed five A.B.s and four deck-maintenance men, one of whom was a seaman named Vaisenan. This was an error. Vaisenan should have been listed as an A.B. and the error was corrected on the payroll, but in the meantime the Marine Casualty Report had been made up and the correction was not made there. The official crew list and the Shipping Articles both show the true fact that Vaisenan and five others were A.B.s, and the crew was complete (Exhs. 25 and 75). It would not affect privity anyway.

CONCLUSION

It is a human tendency, which even judges, being human themselves, have to guard against, to seek out and fasten fault on somebody after an injury or loss. We like to find somebody to blame, and hindsight is the handmaiden of that propensity. It is a severe and unjust way of judging against which the Admiralty Courts have often warned us.

Yet even by that severe standard, it is hard to read the testimony in this case and find anything the petitioner did wrong. Certainly it is impossible to do so, if we look at these matters, as the courts say we must, not with the critical eye of hindsight, but as they appeared to the actors at the time.

The record is one of scrupulous and unremitting care, where even scrupulous and unremitting care could not avail against the overwhelming might of the seas in one of the greatest storms on record. (See Clark v. States Steamship Company, 1956 A.M.C. 2055, D.C. Cal.)

These remarks may seem to pertain more to exoneration than to limitation. And, in a way they do. But only partly so. They pertain to limitation too. For before limitation can become a subject of inquiry, liability and the *cause* of liability must be found. It is only then we pursue the further subject of limitation.

Now it is true the Trial Court has found liability. We have discussed that in our Opening Brief, and shall

not renew it here. It is enough to say that we believe that finding is clearly erroneous, and that this Court will reach the same conclusion. If so, then of course there is an end of the matter.

But now suppose we are wrong. What then is the question confronting this Court? A very simple one. Only this: Contrary to the Trial Court's conclusion that the PENNSYLVANIA must have been unseaworthy because she sank, while others did not, his finding of petitioner's lack of privity is a distinct finding of *fact* based on ample evidence. And the only question before this Court is: Is that finding of *fact* clearly erroneous.

We confidently submit that it is not.

Respectfully submitted,

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